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No. 171

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

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OPINIONS BELOW

The opinion of the district court (R. 13–20) is reported in 37 F. Supp. 347. The opinion of the circuit court of appeals (R. 25–32) is reported in 127 F. (2d) 349.

JURISDICTION

The judgment of the circuit court of appeals was entered March 23, 1942 (R. 33). The petition for writ of certiorari was filed June 23, 1942, and was granted October 12, 1942. The jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Acts of February 15, 1901, and March 4, 1911, permitting private interests to acquire rights-of-way for telephone, telegraph and power purposes "within or through any * * * Indian, or other reservation" only upon certain conditions are applicable to individual trust allotments within an Indian reservation, so that a power company whose lines traverse a trust allotment is required to comply with the conditions of those statutes.

2. Whether the grant of "permission" to a state under Section 4 of the Act of March 3, 1901, to open and establish a public highway across Indian lands renders inapplicable to persons seeking power line rights-of-way over the highway the requirements of specific legislation regulating the grant of rights-of-way over Indian lands for purposes of maintaining power lines.

STATUTES INVOLVED

The Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. sec. 959; Sections 3 or 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. sees. 319, 357, and 311; the Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253,

43 U. S. C. sec. 961; and pertinent sections of other statutes granting special rights-of-way across Indian lands, are printed in chronological order in the Appendix, *infra*, pp. 30–37.

STATEMENT

This is a suit by the United States for declaratory and injunctive relief against a power company which has placed electric transmission lines and poles along a highway across an Indian trust allotment without having first obtained the consent of the Secretary of the Interior. The facts are stipulated and not in dispute:

In 1883 the President by executive order established a reservation in Oklahoma (then the Indian Territory) for the Kickapoo Indians.[1] The tribe and the United States subsequently agreed that the lands within the reservation should be allotted in severalty.[2] A trust patent to allotment 193 (to which this suit relates) was issued on October 6, 1894, to She-pah-tho-quah, a Mexican Kickapoo (R. 9, 21). Although the original allottee has since died, the land is still held in trust by the United States for her heirs (R. 9, 21).

On July 9, 1926, the State of Oklahoma, through its highway commission, requested the Secretary

[1] Kappler, Indian Laws and Treaties (2d ed.) 844; Annual Report of the Commissioner of Indian Affairs, 1883, p. 223.

[2] Act of March 3, 1893, c. 203, 27 Stat. 557. See *United States* v. *Reily*, 200 U. S. 33, 36.

of the Interior of the United States "to grant permission in accordance with section 4 of the act of March 3, 1901 (31 Stats. L., 1058, 1084), to open and establish a public highway", eighty feet in width, across certain lands within the Kickapoo Indian Reservation, including trust allotment 193 (R. 10, 21). On January 20, 1928, damages in the sum of $1,275.00 having been paid to the United States for the heirs of She-pah-tho-quah, the Assistant Secretary of the Interior approved the map of definite location which accompanied the state's highway application (R. 11, 21).

On October 9, 1936, the State Highway Commission of Oklahoma granted to the Oklahoma Gas & Electric Company, an interstate public utility, a license "to erect, construct and maintain a 4,000 volt electric line along, upon or across" certain highways in Oklahoma, including the segment of highway which crosses the allotment in question, "for the purpose of transmitting, selling, and using electricity" (R. 11, 12, 21). The license states that it is revocable at will and that it "is granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property" (R. 13, 21).

Pursuant to this license from the State Highway Commission, and without requesting a permit or easement of any kind from the Secretary of the Interior, the Oklahoma Gas & Electric Company

proceeded to erect, and has since maintained, eight poles along that portion of the highway which diagonally traverses allotment 193 (R. 8, 11, 21). The Company having repeatedly refused to apply to the Secretary of the Interior for a permit under the Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. sec. 959, or for an easement under the Act of March 4, 1911, c. 238, 36 Stat. 1253, 43 U. S. C. sec. 961, the Secretary of the Interior requested the Attorney General to institute appropriate legal proceedings to compel compliance.

This suit was accordingly brought on June 18, 1940, for the purpose of obtaining an authoritative interpretation of these several right-of-way statutes. In its complaint the Government sought a declaratory adjudication that respondent's power line across allotment 193, erected without prior compliance with the federal statutes relating to the construction of power lines across Indian lands, constituted a use of federally owned property not included in the highway permit acquired by the State of Oklahoma in 1928 (R. 2–5). The Government asked that the poles and lines be removed and that damages computed at $5.00 for each of the eight poles be assessed against the defendant (R. 5).

In its answer respondent asserted that the State of Oklahoma acquired a highway "easement" across the allotment in question in 1928, and contended that the United States no longer had any

jurisdiction, authority or control over the said "easement" (R. 5–7).

The district court denied the relief sought, holding that the nature and incidents of the highway grant or easement acquired by the State across the allotment in question pursuant to the Act of March 3, 1901, are to be determined by the laws of Oklahoma, and that the maintenance of electric transmission lines on public highways in that state does not constitute an additional servitude for which the owners of abutting property are entitled to compensation (R. 13–20). The circuit court of appeals affirmed, but on entirely different grounds. It held that the interpretation and construction of the 1901 Act is a federal question to be determined without reference to "state notions of its meaning and purpose" (R. 27). But, after examining numerous right-of-way statutes, it concluded that an Indian trust allotment is not a "reservation" within the meaning of the special acts of February 15, 1901 and March 4, 1911, dealing with electric transmission lines, that these special statutes are therefore inapplicable, that the grant of permission to establish a "public highway" under the Act of March 3, 1901, was under the circumstances, therefore, broad enough to sanction the use thereof for power lines, and that respondent could not be required to comply with the conditions prescribed by Congress in the special Acts governing the granting of rights-of-way for power purposes (R. 27–32).

SPECIFICATION OF ERRORS

1. The circuit court of appeals erred in holding that a trust allotment is not a "reservation" within the meaning of the acts of Congress permitting private interests to acquire rights-of-way for telephone, telegraph, power, and other purposes "within or through any • • • Indian, or other reservation only upon approval of the chief officer of the department under whose supervision or control such reservation falls and upon a finding by him that the same is not incompatible with the public interest".

2. The Circuit Court of Appeals erred in holding that a state which has been permitted to establish a public highway across Indian trust allotments under Section 4 of the Act of March 3, 1901, may in turn permit a power company to maintain its transmission lines and poles along those portions of the highway in contravention of express conditions imposed by Congress in special statutes governing the acquisition of rights-of-way for power purposes across Indian reservations.

SUMMARY OF ARGUMENT

I

The court below, in holding that a trust allotment is not a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, failed properly to consider statutes *in pari*

materia and ignored a contrary administrative interpretation consistently followed for thirty-five years. Ever since 1907 the Department of the Interior has ruled that the phrase "Indian, or other reservation" as used in the various right-of-way statutes includes individual trust allotments within an Indian reservation. *Fresnol Water-Right Canal*, 35 L. D. 550, 551 (1907); *Instructions—Applications for Power Permits Within Indian Reservations*, 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District*, 45 L. D. 563, 565–567 (1916); 51 L. D. 41, 42 (1925); see also 49 L. D. 396, 397–398 (1923) (dictum). And this Court, in construing comparable language making it a federal offense for an Indian to commit certain crimes "within the limits of any Indian reservation", has likewise held that trust allotments are reservations. *United States* v. *Celestine*, 215 U. S. 278, 284–286.

Since trust allotment 193 is a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, providing for power rights-of-way "within or through any * * * Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and upon a finding by him that the same is not incompatible with the public interest", compliance with the conditions imposed in those Acts should have been required.

II

That a grant of permission to a state to open and establish public highways across Indian lands under Section 4 of the 1901 Act was not intended to confer upon the state authority to license the unused portions of such rights-of-way for pipe lines, telephone or telegraph lines, railroad, canal and other comparable uses is clearly shown by other right-of-way statutes *in pari materia,* and by long continued administrative practice:

The Act of March 3, 1901, providing for the opening and establishment of highways is but a fragment of the numerous acts of Congress which have granted rights-of-way across the public lands and reservations of the United States. The Acts of February 15, 1901 and March 4, 1911, deal specifically with rights-of-way for power purposes. They expressly declare that a permit or easement for electric transmission lines or poles "shall be allowed within or through any military, Indian, or other reservation *only* upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and *upon a finding by him that the same is not incompatible with the public interest*". The nature of the interest which Congress authorized to be granted to a state under Section 4 of the Act of March 3, 1901, being clearly limited in scope (cf. *Swendig* v. *Washington Co.,* 265 U. S. 322; *United*

States v. *Colorado Power Co.*, 240 Fed. 317 (Colo. 1916); 30 L. D. 588 (1901)), must be determined in the light of these special statutes dealing with rights-of-way for power purposes. Hence, a mere grant to the state of "permission" to establish a "public highway" does not mean that the state may in turn license the use of that highway for telephone, telegraph, power and pipe lines, canal, railway and other purposes *covered by specific federal right-of-way statutes.* And such has been the construction placed on these various statutes by the Department of the Interior. That Department's construction of the land laws of the United States is entitled to great weight. *Cramer* v. *United States*, 261 U. S. 219, 227.

The nature of the interest which a state acquires by a grant under Section 4 of the Act of March 3, 1901, and the uses to which a right-of-way thus granted may be put are to be determined by federal law. *United States* v. *Oregon*, 295 U.S. 1, 27–28; *United States* v. *Holt Bank*, 270 U.S. 49, 55–56; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 87.

ARGUMENT

Congress has, by a series of acts, comprehensively prescribed requirements which must be met by persons seeking rights-of-way through lands owned by the United States for various public

utility purposes. The basic Act in this series is that of February 15, 1901, which authorizes and empowers the Secretary of the Interior "to permit the use of rights of way through the public lands, forests and other reservations of the United States" for electrical power purposes, for telephone and telegraph purposes, for pipes and pipe lines, and for irrigation and mining purposes. The grantee of a permit under this Act does not acquire "any right, or easement, or interest in, to, or over any public land, reservation, or park"; he acquires only a permit, revocable at the discretion of the Secretary of the Interior. *Swendig* v. *Washington Co.*, 265 U.S. 322; *United States* v. *Colorado Power Co.*, 240 Fed. 217 (Colo. 1916); 30 L.D. 588 (1901) (Van Devanter).

Since many utilities hesitated to make large investments in reliance upon revocable permits, Congress proceeded to enact a series of statutes by which these companies could also acquire actual easements across Indian lands.[3] Section 3 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083, 25 U.S.C. sec. 319, empowered the Secretary of the Interior "to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines". The Act of March 11, 1904, c. 505, 33 Stat. 65 (25

[3] Cf. S. Rep. No. 967, 61st Cong., 3d Sess., p. 1 (1911) (Serial No. 5840).

U. S. C. sec. 321, authorized the Secretary to grant similar easements for pipeline purposes. And finally the Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253, 43 U. S. C. sec. 961, empowered the Secretary to grant easements for electric transmission lines and poles. The pattern was thus complete: the last three acts provided for actual easements for most of the purposes for which permits could be granted under the Act of February 15, 1901. As a result of these parallel enactments, the various utilities have a choice of applying for a permit under the Act of February 15, 1901, or an easement under the later statutes. 30 L. D. 588 (1901) (opinion by Assistant Attorney General Van Devanter); 40 L. D. 30, 31 (1911). But whether the companies seek a permit or whether they apply for an easement they must comply with the conditions imposed by Congress in the particular statute under which their application is made.

With respect to power lines of the sort here involved, the Acts of February 15, 1901, and March 4, 1911, provide that the permits and easements to be issued thereunder "shall be allowed within or through any * * * military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and upon a finding by him that the same is not incompatible with the public interest". The ulti-

mate question in this case is whether the respondent must comply with the requirements of these two Acts by securing the approval of the Secretary of the Interior for the construction of its power lines across the land here in question.

Both the district court and the circuit court of appeals concluded that compliance with these statutes was unnecessary, but they differed in their reasoning. The district court reached its conclusion on the theory that by granting "permission" to the State of Oklahoma to open and establish a highway across the lands here involved under Section 4 of the Act of March 3, 1901, dealing with rights-of-way for state highways, the Secretary of the Interior had parted with both his power and his duty under other legislation to supervise the use of the land composing the highway for any rights-of-way for utility purposes. The rationale of the circuit court of appeals, which rejected the broad ground relied upon by the district court, was that neither of the foregoing Acts applied to rights-of-way over individual trust allotments; therefore the "permission" granted to the State of Oklahoma to open a public highway across the allotted land here in question, in the absence of any applicable legislation restricting the scope of the interest thus acquired, was held to constitute sufficient authority to permit the state to license the use of the highway for power line purposes.

I

The requirements of the Acts of February 15, 1901, and March 4, 1911, governing the grants of rights-of-way "within or through any * * * Indian, or other reservation" apply to rights-of-way over trust allotments within a reservation

The Act of February 15, 1901, provides:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States * * * for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, [and various mining and irrigation purposes] * * * *Provided*, That such permits shall be allowed within or through * * * any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reservation falls and upon a finding by him that the same is not incompatible with the public interest * * *.

The Act of March 4, 1911 provides substantially that where permits might have been granted for electric power and telephone and telegraph purposes under the Act of February 15, 1901, easements may also be granted.

The conclusion of the circuit court of appeals with respect to the inapplicability of these Acts to individual trust allotments within Indian reservations was based primarily on the fact that they did not explicitly include trust allotments in their coverage, whereas later legislation dealing with rights-of-way for telegraph and telephone purposes[4] and pipe-line purposes[5] did specifically cover trust allotments along with other Indian lands. But the inference that by failing explicitly to include allotments in the basic statute Congress intended to exclude them from its coverage applies equally to other specified types of Indian lands in the later statutes.[6] The obviously broad coverage of the Act of February 15, 1901, renders any such

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[4] A right-of-way, in the nature of an easement, (as distinguished from the permit granted by the Act of February 15, 1901) may be granted "through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation * * *." Sec. 3, Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. sec. 319.

[5] The above language of Section 3 of the Act of March 3, 1901, is incorporated expressly in the Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. sec. 21.

[6] E. g., any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service.

inference as to congressional intent doubtful.' On the other hand, that Congress did not intend to treat rights-of-way over trust allotments any differently from rights-of-way over other Indian lands is suggested by the statute first providing comprehensively for allotments—the General Allotment Act of 1887. That Act contained a section providing that nothing therein should "be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian or a tribe of Indians * * *" (c. 119, 24 Stat. 391, 25 U. S. C. sec. 341).[4]

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[3] Moreover, the nice point which the court below thus makes of the differences in the statutory language presupposes an identity of origin for the legislation which is here lacking. The two later Acts in which trust allotments are specifically mentioned dealt with Indian lands exclusively, and were the products of House and Senate Committees on Indian Affairs [for the Act of March 3, 1901, see 56th Congress, 2d Session, H. R. 12904; H. Rept. No. 2064; S. Rep. No. 1979. For the Act of March 11, 1904 see 58th Congress, 2d Session, H. R. 9636, S. 3317, H. Rep. No. 906; 38 Cong. Rec. 612, 684, 1302, 1403 and 1902], whereas the Act of February 15, 1901, dealt with public lands generally and was reported out by the House Committee on Public Lands [See 34 Cong. Rec. 1157].

[4] Congress has from time to time treated allotted lands differently from other lands on Indian reservations. But in such cases it was not left to inference that the allotted lands were being singled out for special treatment. One of the very Acts upon which the circuit court of appeals relied—the Act of March 3, 1901, Section 3—affords such an instance. There, by a separate paragraph, Congress authorized condemnation of allotted lands, and only of allotted lands.

A consideration of the consequences of the construction adopted by the circuit court of appeals makes it even more doubtful that Congress intended to exclude trust allotments from the coverage of the Acts of February 15, 1901, and March 4, 1911. Thus, although the allottee is protected when easements over allotted lands are sought for telephone, telegraph, or pipe-line purposes (since the statutes providing for such easements specifically allude to allotments) the interpretation adopted by the circuit court of appeals would deprive allottees of such protection when easements for power lines are sought. This result contrasts sharply with the comprehensive coverage of the legislation with respect to easements over other types of Indian lands for all utility purposes. It is also doubtful whether, as the decision below necessarily implies, Congress intended to forbid the issuance of *permits* across Indian trust allotments for telegraph, telephone and pipe-line purposes, at the same time that it provided for the grant of *easements* for identical purposes. Nor is there any evidence either in the language of the legislation or otherwise that Congress intended to deprive the Secretary of the Interior of his authority to grant either permits or easements for power lines across trust allotments outside of highways. Yet that too is a necessary implication of the decision below. Certainly, a more explicit indication of congressional intention than the fail-

ure, in a statute of such broad coverage, to allude specifically to allotments is required before a construction which produces gaps in the congressional scheme for regulating rights-of-way over Indian lands can be adopted.

Conformity to the pattern of related legislation is not the only guide-post to the meaning of the term "reservation" in the Acts of February 15, 1901 and March 4, 1911. Under well-established administrative construction the result thus pointed to is also required. It was early indicated, in an opinion prepared by Assistant Attorney General Van Devanter, that any land set aside or "reserved" by the United States for special purposes is a "reservation" as that word is used in the statutes providing for rights-of-way "within or through any * * * Indian, or other reservation". Cf. *Rio Verde Canal Co.*, 27 L. D. 421, 422 (1898). Ever since 1907 the Department of the Interior has ruled that the phrase "Indian, or other reservation", as used in the various right-of-way statutes, includes individual trust allotments within an Indian reservation. *Fresnol Water-Right Canal*, 35 L. D. 550, 551 (1907); *Instructions—Applications for Power Permits Within Indian Reservations*, 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District*, 45 L. D. 563, 565–567 (1916); 51 L. D. 41, 42 (1925). See also 49 L. D. 396, 397–398 (1923) (*dictum*). As a general matter, the long-continued construction of a statute by those charged with its

administration "is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." *United States* v. *Johnston,* 124 U. S. 236, 253; *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336. And with respect to land grants this Court has given particular weight to rulings of the Department of the Interior. *Cramer v. United States,* 261 U. S. 219, 227. In view of its appropriateness against the background of related right-of-way legislation there is no reason for upsetting this well-established administrative interpretation.

The conclusion thus reached from an examination of the legislation, and its administrative construction, has also been suggested by this Court in construing indistinguishable legislation. *United States* v. *Celestine,* 215 U. S. 278, held expressly that the term "reservation" in an act making it a federal offense for an Indian to commit certain crimes "within the limits of any Indian reservation" included trust allotments.

Since trust allotment 193 is a "reservation" within the meaning of the Acts of February 15, 1901, and March 4, 1911, providing for power rights-of-way "within or through any * * * Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such * * * reserva-

tion falls and upon a finding by him that the same is not incompatible with the public interest", compliance with the conditions imposed in those Acts should have been required.*

II

The grant of "permission" to a State to open and establish a public highway under the Act of March 3, 1901, does not absolve applicants for rights-of-way for public utility purposes from the necessity of complying with right-of-way legislation otherwise applicable to them

It would follow from respondent's failure to comply with the requirements of the Act of February 15, 1901, and March 4, 1911, that the decision of the circuit court of appeals must be reversed, unless the "permission" obtained by the State of Oklahoma under Section 4 of the Act of March 3, 1901, to open a public highway across the lands here in question authorized the State to toll the requirements of those two Acts. It was this broad reasoning on which the district court relied in concluding that respondent was absolved from the necessity of complying with those statutes.

Section 4 of the Act of March 3, 1901, c. 832, 31

* The Acts of 1901 and 1911, in so far as they provide for power rights-of-way across Indian allotments were not repealed by the Federal Water Power Act of June 10, 1920, c. 285, 41 Stat. 1063, and continue to be administered by the Department of the Interior. 51 L. D. 41, 42 (1925).

Stat. 1058, 1084, 25 U. S. C. sec. 311, reads as follows:

> the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

There is little question that Congress did not intend, in providing for "permission" to states to open and establish public highways across Indian lands, that this permission would, without more,[*] carry with it the authority to relieve utility companies of the requirements of other right-of-way legislation.

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[*] It is not necessary in this case to decide whether the Secretary of the Interior could, in granting "permission" under Section 4, by express language authorize a state to license its highway for power or telephone line purposes. The application of the State of Oklahoma requested the Secretary merely "to grant permission in accordance with section 4 * * * to open and establish a public highway", (R. 10) and the grant by the Secretary reads: "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L., 1058–1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim." (R. 11.)

At the outset it must be emphasized that "permission", rather than an "easement", is the interest which the Secretary is authorized to grant under Section 4. That grants of easements, which were regarded by Congress as more substantial interests than grants of "permission",[11] were authorized by other sections of the same Act[12] suggests that Congress intended the grants to the states under this section to be extremely limited. The limits on the state's powers over rights-of-way thus granted become clear when Section 4 is examined in the context of related right-of-way legislation.

As has been pointed out above (pp. 10–13), by the Act of February 15, 1901, permits for rights-of-way over all public lands (including Indian lands) for electric power, telephone, telegraph, pipe-line, irrigation and mining purposes were authorized. The grant of more substantial interests—easements—was later authorized for telephone and telegraph purposes[13] and pipe-line purposes[14] over Indian lands. And in 1911 the grant of easements over most of the lands covered by the Act of February 15, 1901, for limited utility

[11] Cf. S. Rep. No. 967, 61st Cong., 3d Sess., p. 1 (1911) (Ser. No. 5840).

[12] Section 3, Act of March 3, 1901, c. 832, 31 Stat. 1083, 25 U. S. C. sec. 319.

[13] Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083, 25 U. S. C. sec. 319.

[14] Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. sec. 321.

purposes was also authorized. In this legislation Congress was clearly authorizing the national Government, rather than the states, to regulate the use by various utility enterprises of rights-of-way across Indian lands. Since the grant of "permission" to states for the opening and establishing of public highways was authorized as part of the scheme for federal regulation of rights-of-way over Indian lands, it is reasonable to conclude that it was not intended to conflict with the other portions of the scheme. The improbability of conflict is emphasized by the fact that Section 4 was itself part of an Act which, in other sections, provided for federal regulation of utility rights-of-way. In this light, the care with which Congress avoided granting to the states any interest in the right-of-way greater than "permission" to use it for a public highway points to the conclusion that the "permission" thus granted to a state to open and establish a public highway does not carry with it the power to authorize uses of the highway which would otherwise violate the related federal legislation addressed specifically to rights-of-way for various utility purposes.

The conclusion thus arrived at from an examination of related legislation has long been adopted by the agency charged with administering these various right-of-way statutes. The Department of the Interior has taken the position that permission to establish a "public highway" across

Indian lands does not carry with it the right to locate pipe lines, etc., along such highways. For example, the pipe line regulations of December 21, 1906,[18] after outlining the procedure for acquiring rights-of-way for pipe lines under the Act of March 11, 1904, expressly declare that "where such pipes or pipe lines are laid under any road or traveled highway the individual or company constructing them shall keep open to travel during construction at least one-half in width of such road or highway, and on completion of construction shall restore such highway to its original condition, refilling any excavation whenever, by settling or other causes, the necessity may arise." These regulations make it clear that pipe lines constructed along "public highways" traversing Indian lands are nonetheless subject to the requirements and conditions prescribed by the 1904 Act. There are no reasons why private companies using such highways for telephone, telegraph, power and other purposes covered by specific federal statutes should not also comply with the express conditions imposed by Congress.

That Congress, in enacting Section 4 did not intend a grant under it, without more, to derogate from the requirements of the Acts of February 15, 1901, and March 4, 1911, thus seems evident.

There remains to be considered only the theory of the district court that the law of Oklahoma,

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[18] Current regulations to the same effect are to be found in 25 Code of Federal Regulations, sec. 256.33.

rather than the federal law, determines the scope of the State's power to license the use of the right-of-way which had been granted to the State under Section 4. In holding that state law rather than congressional intent and purpose furnished the appropriate yardstick for measuring the character of the interest thus granted to the State, the district court relied partly upon the Act of March 3, 1901, but more particularly upon the doctrine enunciated in *Barney* v. *Keokuk*, 94 U. S. 324. The circuit court of appeals correctly rejected this reasoning (R. 27).

The rationale of *Barney* v. *Keokuk* is not in point here. That case established the principle that title to lands underlying navigable waters having passed to the states upon their admission into the Union, the states may in turn relinquish their rights in these submerged lands to the riparian patentees of the Federal Government. Whether the states have or have not done so is obviously a matter of local law. But the logically prior question, whether the states have theretofore acquired any rights from the United States which they may in turn confer on private persons, is a matter to be determined by federal law. *United States* v. *Oregon*, 295 U. S. 1, 27–28; *United States* v. *Holt Bank*, 270 U. S. 49, 55–56; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, 87.

Congress can, of course, by express language or by implication incorporate local law into federal

statutes. But "the construction of grants by the United States is a federal not a state question * * *, and involves the consideration of state question only insofar as it may be determined *as a matter of federal law*[16] that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances." *United States* v. *Oregon*, 295 U. S. 1, 28; *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349–350, 351–352.

That Congress did not in this statute import local law as the measure of the state's powers over the right-of-way is suggested by a number of considerations. Only "the opening and establishing" of the public highway is to be governed by state law.[17] Concerning the nature of the state's interest in the right-of-way and the collateral uses to which the state can subject the land thus used for a highway, the Act says nothing except that the grant is for "public highway" purposes. But the absence of an explicit declaration as to whether local law is to measure the size of the congressional gift does not mean that Congress intended the state's policy in this matter to prevail. It is the character of a donation by Congress which is to be determined, and some-

[16] Italics added.

[17] For example, deciding whether a state or county agency builds the road, or whether funds shall be appropriated by a bond issue or in some other way, or contracting for the construction of the road, or determining the terms and

thing more explicit than the language here used would seem necessary if Congress intended the size of its bounty to be determined by the recipient. This is particularly so when Congress has indicated in related legislation that the Federal Government is not indifferent to the uses to which rights-of-way over the lands involved are to be put. In the face of the explicit and comprehensive scheme by which Congress has seen fit to regulate the grants of rights-of-way over Indian lands it is difficult to believe that varying state policies over collateral uses of highways [18] were

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specifications for the construction job must accord with the requirements of state policy.

[18] In some jurisdictions, including Oklahoma (*Nazworthy* v. *Illinois Oil Co.*, 176 Okla. 37, 54 P. (2d) 642 (1936), it has been held that the state may authorize the use of its highways for telephone, telegraph and power lines without imposing an additional burden or servitude upon the servient estate. The court below apparently believed there were no cases to the contrary (R. 31). Such is not the fact, however. There are a great number of decisions holding that a private owner who grants to the state an easement across his land for highway purposes is entitled to additional compensation, and further easements must be procured, if the highway is to be used for the erection of telephone, telegraph or electric transmission lines. *Cathey* v. *Arkansas Power & Light Co.*, 193 Ark. 92, 97 S. W. (2d) 624, 626 (1936); *Gurnsey* v. *Northern California Power Co.*, 160 Cal. 699, 709, 117 Pac. 906, 910 (1911); *Burrall* v. *American Telephone & Telegraph Co.*, 224 Ill. 266, 268, 79 N. E. 705 (1906); *Maryland Telephone & Telegraph Co.* v. *Ruth*, 106 Md. 644, 653, 68 Atl. 358, 360 (1907); *Bronson* v. *Albion Tel. Co.*, 67 Neb. 111, 116, 93 N. W. 201, 202 (1903); *Nicoll* v. *New York & N. J. Tel. Co.*, 62 N. J. Law 733, 736, 42 Atl. 583, 584 (1899); *Tri-State Telephone & Telegraph Co.* v.

meant to be adopted.[19] In any event, a clear congressional expression would seem to be required before state notions as to the collateral uses of highways can be imported. No such expression appears either in this statute or elsewhere.

The suggestion by the court below that the allottee has already received a substantial sum as compensation for the highway permit is beside the point. Presumably Congress in prescribing the requirements for rights-of-way for highways and for various utility purposes considered the problem of adequate and overlapping compensation and left its resolution to appropriate administrative officers. The Secretary can, and might very

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Cosgriff, 19 N. D. 771, 780, 124 N. W. 75, 79 (1909); *Ohio Bell Telephone Co.* v. *Watson Co.*, 112 Ohio St. 385, 395, 147 N. E. 907, 910 (1925); *Southwestern Telegraph & Telephone Co.* v. *Smithdeal*, 103 Tex. 128, 133, 124 S. W. 627 (1910); *Western Union Tel. Co.* v. *Williams*, 86 Va. 696, 705, 11 S. E. 106, 108 (1890); *Krueger* v. *Wisconsin Tel. Co.*, 106 Wis. 96, 109, 81 N. W. 1041 (1900). Cf. *Brown* v. *Asheville Electric Light Co.*, 138 N. C. 533, 538, 51 S. E. 62, 65 (1905).

[19] Indeed, it is doubtful whether with respect to the particular section here involved, state policies were intended to control even in the absence of any national policy. Cf. *Board of Comm'rs* v. *United States*, 308 U. S. 343. It should be noted that another section of the same statute permits the states to acquire a more substantial interest in the land than is granted by the section here involved. If broader powers over the use of the right-of-way are desired by the state, it can proceed under the second paragraph of Section 3, by condemnation. Act of March 3, 1901, c. 832, 31 Stat. 1084, 25 U. S. C. 357; 49 L. D. 396, 397–398 (1923).

well,[20] permit power lines to be placed along existing highways without requiring the payment of additional compensation to the allottee or the tribe. That, however, is a matter to be decided by the Secretary of the Interior. Whether or not Congress provided that he is to retain the power to decide that question is the issue in this case. It is submitted that Congress did so provide, and the specific conditions which Congress has seen fit to impose must be given effect.

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the court below affirming the district court's dismissal of the Government's petition should be reversed with directions to grant the relief requested.

Respectfully submitted,

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[20] Cf. 25 Code of Federal Regulations, Sec. 256.53, which requires the local superintendent, in making appraisals for highway damages, to keep in mind resulting benefits, and in cases where no actual damage is suffered to "counsel" the Indians to give their consent without compensation.

APPENDIX

Act of February 15, 1901, c. 372, 31 Stat. 790, 43 U. S. C. sec. 959:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the

United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Sections 3 and 4 of the Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083–1084, 25 U. S. C. secs. 319, 357, 311:

SEC. 3. That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an

Indian agency or Indian school or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: *Provided*, That incorporated cities

and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

SEC. 4. That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

Act of March 11, 1904, c. 505, 33 Stat. 65, 25 U. S. C. sec. 321:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe

or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided,* That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Inte-

rior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this Act is expressly reserved.

Act of March 4, 1911, c. 238, 36 Stat. 1235, 1253, 43 U. S. C. sec. 961:

> That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any [21] other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

[21] The word "any" appears before the words "other reservation" in the Statutes at Large, but does not appear in the United States Code.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

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